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No. 85-1130

IN THE

Supreme Court of the United States

October Term, 1985

ROBERT HAMILTON, WARREN BISBEE and MARION COSGROVE, *Petitioners*

vs.

ROSE ALDAG, TOWN CLERK FOR THE TOWN OF LOS GATOS, *Respondent*

Tom Ferrito, Pete Siemens, Brent Ventura, Marlyn Rasmussen, Ruth Cannon, James Stoops, Real Parties in Interest and Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California for the Sixth Appellate District

BRIEF IN OPPOSITION

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STATEMENT OF QUESTION PRESENTED

Whether Petitioners' contentions are moot because the State Legislature amended Government Code Section 36503.5 to limit the increase in councilmember terms to ten months and to require at least one election be held on the new date and because the Town electors chose the new date for the general municipal election and two such elections have been held.

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MARLYN RASMUSSEN, RUTH CANNON, JAMES STOOPS,
Real Parties in Interest and Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FOR THE SIXTH APPELLATE DISTRICT

JURISDICTION

The section under which Petitioners invoke the jurisdiction of the United States Supreme Court is inapplicable as 28 U.S.C. § 1256 has been repealed. Petitioners have not indicated that 28 U.S.C. § 2403(b) may be applicable because the constitutionality of a statute of the State of California is drawn in question. The petition does not state that the Attorney General of the State of California has been served pursuant to Supreme Court Rule 28.4(c).

STATEMENT OF THE CASE

The Statement of Facts set forth by the California Court of Appeal for the Sixth Appellate District is accurate. (Pet. App. B., pp. 15-18.)

REASONS FOR DENYING CERTIORARI

Certiorari should be denied because no federal question was decided by the state court inasmuch as the state appellate court dismissed the case as moot.

The applicable considerations for review on a writ of certiorari to determine whether special and important reasons exist are set forth in Rule 17 of the United States Supreme Court. In particular, Rule 17.1(c) provides that a state court has decided an important question of federal law which should be settled by this Court or decided a federal question in conflict with applicable decisions of this Court. The last state court issuing a decision in this case was the California Court of Appeal which dismissed the case as moot. That court did not decide any question of federal law.

The issue of mootness must be considered prior to a review of the constitutional validity of California Government Code Section 36503.5. *Lane v. Wilson*, 307 U.S. 268 (1939). Since Petitioners filed their state court action, the statute which they challenged was amended to provide that no term of office shall be increased or decreased by more than ten months and that at least one election must be held on the new date prior to changing the election date again. These amendments to Government Code Section 36503.5 should be considered together with certain intervening facts which have occurred since Petitioners filed their lawsuit in state court: (1) a special municipal election was held in the Town of Los Gatos in which the electors voted for consolidation of the general municipal election with the general statewide election and (2) two general municipal elections have been held on the selected date.

Even in cases arising in state courts, the question of mootness is a federal one that the federal court must resolve before it assumes jurisdiction. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). On certiorari, Petitioners have the burden of showing the error of the judgment to be set aside. *Higgins v. Carr Bros. Co.*, 317 U.S. 572 (1943). Therefore, Petitioners must first convince this Court that dismissal for mootness by the California Court of Appeal was not correct and that the case is not now moot.

Certiorari should be denied because no case or controversy exists pursuant to Article III Section 2 of the United States Constitution.

Since the 1890's this Court has enunciated that its duty is to decide actual controversies by a judgment which

can be carried into effect, and not to give opinions on moot questions. *Mills v. Green*, 159 U.S. 651, 653 (1895). No justiciable controversy is presented when the question sought to be adjudicated has been mooted by subsequent developments. *California v. San Pablo & T.R.Co.*, 149 U.S. 308 (1893). In more recent times, the issue of mootness has been expressed in terms of failure to meet the case or controversy requirement of Article III, Section 2 of the United States Constitution. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n. 3. (1964).

The purpose of the case or controversy requirement is a broad limitation which maintains the separation of powers by assuring that the federal courts will not intrude into areas committed to other branches of government. *Flast v. Cohen*, 392 U.S. 83 (1968). In discussing the rule against advisory opinions, this Court stated that such a rule "implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III." *Id.* at 96. In this case, the amendment to Government Code Section 36503.5 by the California Legislature addresses Petitioners' concern that a city council would extend its terms indefinitely depriving Petitioners of the right to vote. A decision by this Court would surely intrude into the legislative area at a time when the California Legislature has already acted to amend the statute challenged by Petitioners.

Further support that this case is not justiciable because it does not meet the case or controversy requirement is the holding by this Court that an actual controversy must exist at all stages of review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). Although a controversy existed when Petitioners sought a writ of mandate with the Superior Court of Santa Clara County on March 12, 1982, a controversy no longer

exists. The election that Petitioners sought to compel the Town of Los Gatos to hold was held on November 2, 1982.

The cancellation of a general municipal election in the Town of Los Gatos would be governed by the limitations of Government Code Section 36503.5. Since the Los Gatos electorate has indicated its preference for consolidation of the general municipal election with the general statewide election, it is pure conjecture by Petitioners that a similar controversy would occur. Mere speculation about possible recurrence is not sufficient to avoid mootness. *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *rehearing denied* 312 U.S. 712 (1941); *petition denied* 317 U.S. 594 (1942). Academic or episodic problems are not sufficient "special and important" reasons within Supreme Court Rule 17 to support the granting of certiorari, especially in cases involving constitutional questions. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

If Petitioners were to be dissatisfied with a subsequent change of election dates, they could file a new action. The availability of such a remedy is another reason that this Court should find that this case is not an exception to the mootness doctrine. See *DeFunis v. Odegaard*, 416 U.S. 312, 319 1974). Consequently, this Court should not grant certiorari because no current controversy exists and any new controversy, should it arise, could be addressed by the filing of a lawsuit at such time.

In accordance with the reasons behind the mootness doctrine, this petition should be denied to preserve flexibility in the law by not creating unnecessary precedent. Petitioners raise novel legal issues in the petition: analogyzing the right to vote in a scheduled election to a vested property right and creating the term "color of elec-

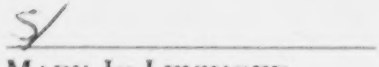
tion". Respondents urge this Court to be cautious in considering Petitioners' contentions because of the great gravity and delicacy of constitutional cases and the broad stare decisis effect of constitutional decisions. *Ashwander v. TVA*, 297 U.S. 288, 345 (1936), (Brandeis, J., concurring), *rehearing denied* 297 U.S. 728 (1936); *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting), *rehearing denied* 324 U.S. 885 (1945). The mootness issue in this case must first be resolved before this Court broaches the constitutional challenge to the California statute now amended. For these reasons, exercise of judicial discretion compels denial of the petition.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: January 30, 1986

Respectfully submitted,



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